

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In re Application of: |) | |
| |) | |
| CLARK COUNTY SCHOOL DISTRICT |) | |
| |) | File No. BPLIF-931230HK |
| For Authority to Construct and Operate a Station |) | Facility ID No. 11695 |
| in the Instructional Television Fixed Service on |) | |
| the A Group Channels at Las Vegas, Nevada |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 2002

Released: March 22, 2002

By the Chief, Video Services Division:

1. The Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration a petition filed by North American Catholic Educational Programming Foundation, Inc. ("NACEPF") seeking reconsideration of the Memorandum Opinion and Order granting the above-captioned application of Clark County School District ("CCSD") for a new Instructional Television Fixed Service ("ITFS") station on the A channel group at Las Vegas, Nevada, and denying the mutually-exclusive application filed by NACEPF. *In re Applications of North American Catholic Educational Programming Foundation, Inc.*, 12 FCC Rcd 21552 (1997).

2. CCSD is the licensee of ITFS stations KZH-33 (E group channels) and KZH-32 (C group channels) at Las Vegas. On reconsideration, NACEPF argues that the Commission improperly granted CCSD a waiver of the "four-channel rule," 47 C.F.R. § 74.902(d), which limits the number of ITFS channels any licensee can hold, absent a waiver. NACEPF contends that the Commission failed to apply the "excessively high" standard applicable to such requests for waiver. In response, CCSD states that the Commission applied the correct standard in granting its waiver request and that NACEPF raises no new arguments warranting reconsideration. CCSD also asserts that in light of the continued growth of its district and its inability to meet the educational programming demands with its currently held ITFS channel groups, the grant of the waiver request was proper.

3. We have thoroughly reviewed the decision below and find that there are no errors of law or new facts that would warrant reversing the staff action. Section 74.902(d)(1) provides that "a licensee is limited to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same [channel] Group" An applicant seeking waiver of Section 74.902(d) must demonstrate how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs. *Instructional Television Fixed Service - Report and Order in MM Docket 83-523*, 98 FCC 2d 925, 933 (1984). In assessing such showings, the Commission has stated that waivers may be granted "only where the applicant can overcome a heavy burden of proof." *Instructional Television Fixed Service -- Second Report and Order on Reconsideration in MM 83-523*, 59 RR 2d 1355, 1376 (1986). Among the factors considered in acting on requests for waiver of the four-channel limitation are the amount of ITFS programming that is being proposed on all of the channels involved, the simultaneous use of the channels for a substantial portion of the day, the extent of repetition of the programming, and a demonstrated need

for the additional channels. *See Board of Regents, Eastern New Mexico University*, 10 FCC Rcd 3162 (1995); *School District No. 1 in the City and County of Denver*, 3 FCC Rcd 6392, 6393 (1988).

4. In the decision to grant CCSD's request for a waiver of the four-channel limitation, the Commission stated that it was persuaded that CCSD demonstrated that the requested channels are necessary to provide the wide range of educational and instructional programming proposed.¹ In this regard, the Commission noted that CCSD is responsible for educating 145,000 students enrolled in grades K through 12 at 181 schools, and predicts that by the year 2003, its enrollment will increase to over 270,000 students, requiring the construction of 100 new schools.² In addition, the Commission relied on CCSD's assertion that it provides educational programming to students at over 150 schools, and that the C and E Group channels were "wholly inadequate to satisfy its educational obligations."³ At the time of the waiver request, CCSD indicated that it provides more than 45 hours of ITFS programming per channel per week and that because of lack of channel capacity, it had been forced to cancel over 50 hours of scheduled programming.⁴ The Commission also relied on CCSD's proposal to use the A group channels to provide 68 new ITFS programs, 52 of which are formal educational and 25 of which will be locally produced, and to shift some of the instructional programming from noncommercial educational television station KLVX(TV).⁵ In view of this information, the Commission concluded that grant of the waiver requested by CCSD was warranted.⁶

5. In support of its Petition for Reconsideration, NACEPF argues, *inter alia*, that the Commission erred by basing its grant upon mere speculative information. In response to NACEPF's allegation that CCSD's need for additional capacity is not supported by tangible evidence, CCSD states that it has significant and well-documented need for additional spectrum. According to CCSD, it operated ITFS facilities to provide core educational programming to its students since 1968. As of 1997, CCSD was the tenth largest school district in the country, with a student population of 186,000, serving 170 schools with approximately 240 hours of ITFS programming per week.⁷ CCSD further states that over 80% of CCSD's elementary school teachers, and 60% of secondary school teachers, reported using ITFS programming in the classroom each week, during the 1996-1997 school year. In addition, CCSD provides the sworn affidavit of Thomas Axtell, who is responsible for CCSD's ITFS system, and states that CCSD will use the A channels to offer live interactive French classes, additional math programming, expanded science courses, adult continuing education courses, live and interactive professional development courses, expanded G.E.D. courses and live, interactive support staff programs. In addition,

¹ *North American Catholic Educational Programming Foundation, Inc.*, 12 FCC Rcd at 21553.

² *Id.*

³ *Id.* at 21554.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Moreover, CCSD notes that it uses its licensed ITFS spectrum to offer many *documented* unique educational courses and supplemental learning programs. Over 75% of the CCSD's teachers certified to teach English as a Second Language received their certification courses over ITFS from 1994-1997. Due to a shortage of certified foreign language teachers, 100% of mandatory elementary Spanish language instruction in Clark County originates on ITFS. Furthermore, hundreds of at-risk children enrolled in and successfully completed remedial Algebra, English and World History courses delivered in part over ITFS. CCSD also states that latchkey children kept in after school programs received homework assistance from certified teachers via an ITFS distributed Homework Hotline program that received over 12,000 calls in the 1997 school year. Moreover, Clark County, in cooperation with the community college and university, has used ITFS to offer over 20 dual high school/college credit courses for Clark County students. CCSD notes that these programs served hundreds of college bound students while reducing classroom overcrowding and improving student/faculty ratios.

CCSD plans on carrying certain programming such as electronic field trips live instead of on a tape-delay basis. In view of the foregoing, we disagree with NACEPF's characterization of CCSD's waiver justification as "speculative." In light of the well-documented and detailed proposed educational uses of the A channel group provided by CCSD, we believe that the Commission properly found that the requested channels are necessary for CCSD to be able to provide the wide range instructional programming proposed.

6. NACEPF also argues that the Commission incorrectly failed to consider, as a factor weighing against grant of a four-channel waiver, that CCSD simulcast its two ITFS stations because its E-group transmitter did not have line-of-sight to all of its receive sites. CCSD asserts that the Commission fully addressed this issue and that the staff concluded that "even twelve channels are inadequate to meet [CCSD's] educational and training needs."⁸ We reject NACEPF's argument that CCSD does not need additional capacity because its C-Group and E-Group frequencies distributed the same programming. Rather, as noted in the decision below, the Commission has held in the past that full utilization of the currently assigned channels is not a prerequisite to an applicant's request for additional channels.⁹ Contrary to NACEPF's allegations, the decision below was decided accurately and was fully consistent with Commission rules, policies and precedent. We believe that CCSD has shown adequately that it uses its ITFS channels to provide educational and instructional programming to school children up through twelfth grade and serves the needs of children in the district by planning innovative and essential educational programming. As such, the public interest is best served by granting CCSD a waiver of the four-channel rule.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by North American Catholic Educational Programming Foundation, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

⁸ *North American Catholic Educational Programming Foundation, Inc.*, 12 FCC Rcd at 21554 n2.

⁹ *See Northern Arizona University Foundation*, 7 FCC Rcd 5943, 5945, n.7 (1992).